STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 14, 2003
v	No. 241760 Oakland Circuit Court
HARRY JACOB WALTON, Defendant-Appellant.	LC No. 2001-178581-FC

Before: Kelly, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f). He was sentenced as an habitual offender, second offense, MCL 769.10, to two concurrent terms of imprisonment of forty to sixty years each. He appeals as of right. We affirm.

I. Facts

The complaining witness testified that, in the early morning hours of May 13, 2001, she was drinking with friends at a bar in downtown Mount Clemens, when defendant approached and began talking to her. The complainant admitted to engaging in some intimate touching with defendant at first, and leaving the bar with him in his pickup truck. According to the complainant, the two returned to the bar after "maybe twenty minutes," to find its valet parking service closed, leaving her without access to her car. Defendant offered to take her home.

According to the complainant, defendant insisted on taking back roads, coming to a stop in a dark area where the two left the truck to urinate. The complainant testified that, upon returning to the truck, defendant "grabbed the back of my head . . . and shoved it down towards his . . . private area," in response to which she ran in distress from the truck to a house close to the road, where no one answered her pounding at the door. The complainant explained that because she did not know where she was, she allowed defendant to coax her back into his truck, but that she next remembered hitting her head on grass, having been thrown down. The complainant elaborated that she felt pain in her head from that, and that she next remembered defendant choking her. According to the complainant, defendant then told her that she would do everything he demanded of her, causing her to fear for her life. The complainant testified that she submitted to his demand that she remove her pants, upon which defendant forcibly penetrated first her vagina, then her mouth, with his penis.

The complainant testified that when invited to return to defendant's truck, she did so, but with a plan to jump out as soon as she saw a house close to the road, which she in fact did shortly thereafter. This time, according to the complainant, someone answered her pounding and pleas, and she saw no more of defendant or his truck.

Paul Butterfield testified that, between 2:00 and 3:30 in the morning of May 13, he had returned from work at Meijer when he heard screaming in the front yard. Butterfield described opening the door to the complainant, who said that she had been raped and had jumped from a car. Butterfield allowed the complainant into his apartment and he called 911. He gave his address, located in Oxford, in Oakland County.

The defense admitted that sexual relations took place between defendant and the complainant, but maintained that they were entirely consensual. The jury found defendant guilty as charged.

II. Evidence of Venue

Defendant argues that the prosecutor failed to present sufficient evidence to prove that the conduct at issue took place in a location over which the trial court, the Sixth Circuit Court in Oakland County, had jurisdiction, and that defense counsel was ineffective for failing to make capital of that deficiency. We disagree.

A. Oakland County Venue

Due process requires that trial of criminal prosecutions should be by a jury of the county or city where the offense was committed, except as otherwise provided by the Legislature. *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996). Thus venue, although not an element of a crime, is nonetheless part of the prosecutor's case. *People v Swift*, 188 Mich App 619, 620; 470 NW2d 491 (1991). Accordingly, the prosecution must prove venue beyond a reasonable doubt. *People v Belanger*, 120 Mich App 752, 755; 327 NW2d 554 (1982). However, "[w]henever a felony consists or is the culmination of 2 or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which *any* one of said acts was committed." MCL 762.8 (emphasis added).

The evidence in this case included no allegation of a specific crime scene. However, it is not disputed that the complainant's dealings with defendant began at a bar in Mount Clemens, in Macomb County, and ended in front of the home of Paul Butterfield in Oxford, in Oakland County. The complainant indicated that, after the assault, she returned to defendant's truck because she was afraid, but that she planned to jump from it at the first indication that she might obtain assistance. The complainant's testimony that she acted on her plan immediately after the sexual violence, coupled with Butterfield's address in Oakland County, could persuade a rational trier of fact beyond a reasonable doubt that the assault occurred in Oakland County. Thus, the complainant was still in defendant's clutches up to the moment when she effected her escape in Oakland County. Accordingly, defendant drove the complainant into Oakland County in furtherance of his criminal conduct. This by itself would be sufficient to establish venue in Oakland County. We conclude that the evidence was sufficient to support the finding that, for purposes of establishing venue in the Sixth Circuit Court, the criminal conduct at issue took place in Oakland County.

B. Effective Assistance of Counsel

Defendant asserts that defense counsel was ineffective for failing to seek a directed verdict, or request a jury instruction, on the issue of venue. "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

In fact, the trial court instructed the jury that "the evidence must convince you beyond a reasonable doubt that the crime occurred on or about May 13th, 2001, within Oakland County." In light of the instruction actually given, no claim of ineffective assistance can follow from the argument that defense counsel should have requested it.[1]

Concerning defense counsel's disinclination to request a directed verdict on the venue issue, because we conclude above that there was sufficient evidence to prove venue, we conclude here that counsel had nothing to gain from requesting a directed verdict on that ground. Counsel is "not required to argue a frivolous or meritless motion." *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Further, a defendant wishing to challenge the sufficiency of the evidence to support his or her conviction has the prerogative to do that in the course of exercising the right to appeal, where sufficiency issues receive review de novo and there are no preservation requirements. See MCR 7.203(A) (appeal by right); *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987) (sufficiency challenges need not be preserved); *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000) (sufficiency of the evidence reviewed de novo). For these reasons, defendant has failed to show with this issue that defense counsel was ineffective.

III. Confession

Admitted into evidence was a handwritten statement that defendant prepared for the police, in which he stated: "I did the crimes on [the complainant] as stated on Sunday 5-13-01 approx. 3 AM oral, intercourse, verbal abuse, slap ditched on roadway, picked up later." Following a pretrial evidentiary hearing on a defense motion to suppress that confession at trial, the trial court ruled that the confession was admissible. Defendant argues that the trial court erred in this regard. We disagree.

A reviewing court may not disturb a trial court's ruling at a suppression hearing unless that ruling is clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983).

[1] We prefer to think that defendant's appellate attorney overlooked the trial court's instruction on venue, rather than suppose that counsel hoped to mislead this Court in the matter. Either way, counsel's assertions that no instruction on venue was given, and that trial counsel was therefore ineffective for failing to see to the matter, were in violation of counsel's ethical duties. See MRPC 1.1(b) (requiring adequate preparation), 1.3 (requiring diligence), and 3.3(a)(1) (prohibiting a false statement of law or fact).

"Whether a waiver was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently tendered form separate prongs of a two-part test for a valid waiver of *Miranda* [2] rights." *People v Abraham*, 234 Mich App 640, 644-645; 599 NW2d 736 (1999). "Both inquiries must proceed through examination of the totality of the circumstances surrounding the interrogation. The state has the burden of proving by a preponderance of the evidence that there was a valid waiver of the suspect's rights." *Id.* at 645 (citations omitted).

Defendant challenges only the voluntariness prong of this inquiry. The question of voluntariness is solely a function of police conduct. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997).[3] However, defendant alleges no specific misconduct on the part of the police. Defendant points out that when he wrote the statement he had yet to meet with a lawyer, after 2-1/2 days of detention, but does suggest that this constituted any failure on the part of the police.

The right to counsel attaches upon the initiation of criminal proceedings through a formal charge, preliminary hearing, indictment, information, or arraignment. *People v Marsack*, 231 Mich App 364, 376-377; 586 NW2d 234 (1998). Even before the right attaches generally, however, the police are obliged to inform a suspect of the right to have counsel present during questioning, and to cease interrogations once the suspect has invoked the right. *People v Kowalski*, 230 Mich App 464, 472; 584 NW2d 613 (1998), citing *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The latter limitation does not apply, however, where the suspect initiates discussions with the police. *Kowalski, supra* at 478, citing *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

In this case, there is no dispute that defendant invoked his right to counsel at times while in police custody. However, defendant himself admitted that he signed three *Miranda* waiver forms, and defense counsel admitted that defendant, not the police, initiated the communications that led to defendant's writing of his incriminating statement. Because defendant shows no police misconduct at all, his assertion that his confession should have been ruled involuntary must fail. *Howard, supra* at 538.

Nor would we credit defendant's position had he characterized his waiver of his *Miranda* rights as not having been knowingly and intelligently made. See *Howard, supra* at 538. In order to effect a valid waiver of *Miranda* rights, the prosecution must show, on a preponderance of the evidence, that the suspect understood only that he or she had the right to remain silent, the right to have counsel present for further questioning, and that the state could use whatever the suspect said in a subsequent trial. *Abraham, supra* at 645, 647. Defendant agreed that he was no "babe in the woods" as concerned his position with the police, and added that his only apprehensions about his situation concerned when he would be able to meet with an attorney. Defendant

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[2] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] Defendant thus misstates the law when protesting, in a footnote, that "[t]he fact that it was not the fault of the police that Defendant was not promptly provided an attorney is not a relevant inquiry. It is not necessary that the police did anything *wrong*. Rather, the Court should simply evaluate the totality of the circumstances . . . ."

testified that he was moved to talk to the police precisely because of their resolute refusal to continue discussions after he demanded a lawyer. Defendant's own account confirmed that he was moved to initiate the discussions with the police that resulted in his written confession after a phone conversation with his girlfriend left him feeling upset. Defendant cites no authority for the proposition that emotional despondency over family matters unrelated to a suspect's arrest can prevent that suspect's waiver of *Miranda* rights from being knowing and intelligent. For these reasons, we reject this claim of error.

IV. DNA Expert

Before trial, defense counsel moved the trial court to appoint an expert on DNA evidence to testify on defendant's behalf at public expense. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *In re Attorney Fees of Klevorn*, 185 Mich App 672, 678; 463 NW2d 175 (1990). An abuse of discretion occurs only where a court's action is "so violative of fact and logic as to constitute perversity of will or defiance of judgment . . . ." *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996) (internal quotation marks and citation omitted).

Defendant cites no authority for the proposition that a criminal defendant is entitled to engage an expert, at public expense, to rebut every instance of scientific evidence offered by the prosecution. Instead, MCL 775.15 authorizes a judge, "in his discretion," to subpoena a defense witness to appear at public expense where the defendant cannot otherwise "safely proceed to a trial." See also MRE 706.

Defendant's identity as the person with whom the complainant interacted on the night in question could hardly have been placed at issue. The complainant's own identification of defendant was unequivocal and unchallenged, and defendant's own written statement plainly acknowledged that he was with the complainant on the night in question.

Further, defense counsel was able to make capital out of the evidence that the complainant had initially kissed and fondled defendant in urging the theory of consent on the jury. In the unlikely event that an additional DNA test would have thrown into doubt the conclusion of the prosecutor's expert in this regard, defendant's identity as a participant in the incident in question would not likely have been a matter of doubt in the minds of the jurors. We are confident that the theory of consent was defendant's best defense, and thus that no machinations attendant to the inconsistent defense of mistaken identity would have been of any use.[4] The trial court thus was neither defying judgment nor perverting its will in declining to impose upon the taxpayers the expense of bringing a defense expert whose participation at trial could hardly have improved defendant's position. Thus, defendant fails to show that he suffered any prejudice from the trial court's disinclination to appoint a DNA expert for the defense.

[4] Defendant reports that the defense "had intended to present alternate, inconsistent defenses . . ." Although there is no prohibition of presenting inconsistent defenses, it seems obvious to us that urging both consent and mistaken identity upon the jury in this instance would have seriously impaired any persuasive potential the defense might have had.

V. Bad Acts Evidence

Defendant argues that the trial court abused its discretion in denying a pretrial motion to suppress evidence of a sexual assault occurring in 1981 of which defendant was convicted. We disagree. A trial court ruling admitting evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995).

MRE 404(b)(1) establishes that evidence of other bad acts is not admissible to prove a person's character in order to show behavior consistent with those other wrongs, but provides that such uncharged conduct may be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." See also *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). Because MRE 404(b)(1) announces a general prohibition of character evidence, but then sets forth some broad exceptions, it may fairly be characterized as tailoring a rule of inclusion simply to avoid using it solely to show a propensity to commit a crime. See *VanderVliet*, *supra* at 65-66.

In this case, the prosecutor's witness, L.D.,[5] identified defendant as the man with whom she was involved in an incident that took place in Cincinnati, in 1981. L.D. recounted meeting defendant in a bar, where defendant approached her and initially behaved sociably toward her. L.D. continued that she arranged for defendant to give her a ride home from the bar, but that defendant drove past her neighborhood and changed to an aggressive demeanor. According to L.D., she demanded to be taken home, caused the car to stall, then reiterated her demand, in response to which defendant calmed down, said he had been kidding, and again agreed to take her home. However, defendant instead turned onto a gravel road, stopped the car, turned off the lights, and told her that he had a gun and would kill her if she did not obey his commands. Defendant then ordered her out of the car, and a struggle ensued, in the course of which defendant choked her. According to L.D., she continued to struggle, but defendant struck her in the head with a rock. L.D. testified that defendant removed her pants and penetrated her vagina, then her mouth, with his penis. L.D. added that after the physical abuse, she agreed to return to defendant's car with him, because of fear and the remoteness of the location, and responded affirmatively to defendant's offer to get a soft drink. L.D. stated that once inside a convenience store, she enlisted the clerk for help, and that once defendant noticed what was happening he ran from the premises. Defendant was tried in Ohio in connection with this incident, where he advanced the defense of consent.

L.D.'s account, then, agrees with the instant complainant's allegations, in many particulars: both times, defendant approached the victim in a bar and appeared friendly and helpful, and both times he was ostensibly taking them home but instead drove to secluded locations, choked and otherwise threatened them, forcibly penetrated them vaginally and orally, then fled from the scene when the victims managed to induce third parties to assist them. These similarities point to a common "opportunity, intent, preparation, scheme, plan or system in doing

[5] We use initials to avoid publicizing the name of a victim of sexual assault.

an act," along with "identity, or absence of mistake." MRE 404(b)(1). Further, because the probative value of this evidence was great, we conclude that it was not substantially outweighed by the risk of unfair prejudice. MRE 403.

Finally, the trial court instructed the jurors to consider the evidence of defendant's uncharged bad acts only to show defendant's "plan, scheme, or system, or characteristic scheme that he has used before or since," admonishing them not to consider that evidence "for any other purpose," including to show that defendant is a bad person or one likely to commit crimes. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Given the above, we reject this claim of error.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot